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In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, APPELLANT

v.

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinions of the district court and of this Court on the existence of violations of the antitrust laws are reported, respectively, in 126 F. Supp. 235 and 353 U.S. 586. The opinion of the district court on the relief to be granted to terminate the violation of the Clayton Act adjudged by this Court is reported in 177 F. Supp. 1. Printed copies of the district court's opinion and judgment have been furnished to the Court.

JURISDICTION

This suit was originally brought under § 4 of the Sherman Act, 15 U.S.C. 4, and § 15 of the Clayton Act, 15 U.S.C. 25. The final judgment of the district

court, following remand of the cause to it, was entered on November 17, 1959, and notice of appeal was filed on January 14, 1960. The jurisdiction of this Court is conferred by § 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended. *United States* v. *Yellow Cab Company*, 332 U.S. 218; *United States* v. *du Pont & Co.*, 353 U.S. 586; *International Boxing Club* v. *United States*, 358 U.S. 242.

QUESTIONS PRESENTED

The basic question presented is:

(1) Whether the district court's judgment grants the relief necessary and appropriate to remedy the violation of § 7 of the Clayton Act resulting from E. I. du Pont de Nemours and Company's acquisition and continued ownership of General Motors Corporation stock.

The following questions, which may be subsumed under the foregoing question, are also presented:

(2) Whether the district court misconstrued the Clayton Act by holding that Congress did not thereby intend that divestiture is the remedy to be applied upon determination that there has been a stock acquisition unlawful under § 7 of the Act.

(3) Whether the district court improperly evaluated the factors to be given consideration in determining the relief necessary and appropriate to remedy a violation of § 7.

(4) Whether the district court erred in concluding that there is no method by which du Pont can divest itself of its General Motors stock without undue tax and stock-market consequences.

(5) Whether the district court erred in its conclusions respecting the stock-market consequences of requiring du Pont to divest itself of its General Motors stock.

STATUTE INVOLVED

Section 7 of the Act of October 15, 1914 (commonly known as the Clayton Act), 38 Stat. 731, as originally enacted and in effect at the time the complaint in this case was filed, provided in part as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
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> * * * * *
>
> This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. * * *

Section 11 of the Act of October 15, 1914, 38 Stat. 734, as originally enacted, provided in part as follows:[1]

[1] The quoted portions of the section were not changed in any respect here material prior to the filing of the complaint. The only changes were to amend the first paragraph to give jurisdiction to the Federal Communications Commission as to common carriers engaged in wire or radio communication, and to

Authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. * * *

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the Civil Aeronautics Board as to air carriers subject to regulation by that Board (15 U.S.C. 21).

Section 15 of the Act of October 15, 1914, 38 Stat. 736, as originally enacted and in effect at the time the complaint was filed, provided in part as follows:

> The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This case was initiated by the filing of a complaint in June 1949 charging the defendants with violating §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act. In December, 1954, the district court, after trial, entered a judgment dismissing the compiaint. On appeal, this Court held that du Pont's acquisition and subsequent retention of 23% of General Motors common stock violated § 7 of the Clayton Act, and in view of this determination, did not make a decision on the Sherman Act charges. *United States* v. *du Pont & Co.*, 353 U.S. 586. The Court remanded the cause to the district court to determine the relief necessary and appropriate to terminate the Clayton Act violation.

The Government proposed a plan requiring disposal over a ten-year period of the General Motors stock held by du Pont through declarations of dividends, and of the stock held by Christiana Securities Company and Delaware Realty and Investment Corporation (the two du Pont family holding companies)

through sale, with a provision vesting voting rights in the du Pont holdings of General Motors stock in the public security holders of du Pont during the period of distribution. Du Pont, and two amici curiae appointed by the district court to represent the stockholders of du Pont and General Motors, proposed plans under which the General Motors stock would continue to be owned by the du Pont interests indefinitely, but the voting rights would be passed on to the public stockholders of du Pont. Both parties submitted evidence and filed supporting briefs.

On October 2, 1959, the district court issued its opinion holding that du Pont might continue to hold the General Motors stock forever, but that the voting rights should be passed over to its stockholders. Under this plan, Christiana and Delaware and officers of both of them and of du Pont would not be permitted to vote General Motors stock. The du Pont interests would be forbidden to acquire additional General Motors stock (except pursuant to corporate distributions of stock or rights) and interlocking directors and officers would be forbidden. The opinion also required an injunction against preferential trade arrangements, joint commercial ventures and, for a three-year period, requirements contracts between du Pont and General Motors.

In support of its plan, the district court found that under § 15 of the Clayton Act divestment of the illegally acquired stock was not mandatory; that distribution in this case would result in great losses to the public stockholders of both du Pont and General Motors through the imposition of heavy taxes and

disruption of the market; and that the insulation of voting power, the prohibition of interlocking officials, and the injunction against discriminatory dealings would give sufficient assurance against the likelihood of the exercise of an illegal influence by du Pont over General Motors. The district court adopted its opinion as its findings of fact and conclusions of law.

On November 17, 1959, the district court issued its final judgment incorporating in its order provisions to carry out the plan as outlined in its opinion. It is from this judgment that the Government has appealed.

THE QUESTIONS ARE SUBSTANTIAL

This case is a landmark in the history and development of the antitrust laws, particularly the Clayton Act. The legal issues go to the heart of the statute in a case involving very large business interests engaged in a course of conduct of great significance to the economy of the nation. When, in 1957, this Court adjudged that du Pont's ownership of General Motors stock was illegal, the corollary of the decision was that effective relief would be ordered by the district court to terminate the illegal relationship as promptly as practicable. Instead, the district court has held that du Pont may continue to hold the General Motors stock indefinitely, provided that certain devices are interposed in an attempt to insulate such ownership from its natural and usual results. The Government believes that Congress contemplated divestment as the remedy for violations of § 7 of the Clayton Act and that, whether this is so or not, the devices adopted by the district court to protect against illegal influence

are inadequate. The disadvantages to the stockholders of the corporations involved (and we do not concede that the impact of the ordinary income tax law is legally such) can certainly be reduced by the adoption of a suitable program for divestment, but whether or not they can be eliminated is not the issue here. Congress has the power in the national interest to compel divestment even if the stockholders will incur a reduction in the value of their investment and we believe this is what the Act requires. For these reasons, which we elaborate below, the Government has noted its appeal.

1. The Clayton Act appears specifically to require divestment of the illegally held stock when violations of Section 7 are remedied through cease and desist orders issued by the Federal Trade Commission under Section 11, *supra*, pp. 3–4. From the outset the Commission has followed this procedure[1] and this Court has recognized that divestment is the remedy prescribed. Thus in *Federal Trade Commission* v. *Western Meat Co.*, 272 U.S. 554, the Court stated at 559:

> * * * The Commission's duty was to prevent the continuance of this unlawful action by an order directing that it cease and desist therefrom and divest itself of what it had no right to hold. Further violations of the Act through

[1] See *Aluminum Co. of Am.* v. *F.T.C.*, 284 Fed. 401 (C.A. 3), certiorari denied, 261 U.S. 616; *F.T.C.* v. *Western Meat Co.*, 272 U.S. 554; *Thatcher Mfg. Co.* v. *F.T.C.*, 272 U.S. 554, 560; *Swift & Co.* v. *F.T.C.*, 272 U.S. 554, 561; *International Shoe Co.* v. *F.T.C.*, 280 U.S. 291; *Temple Anthracite Co.* v. *F.T.C.*, 51 F. 2d 656 (C.A. 3); *Vivaudou, Inc.* v. *F.T.C.*, 54 F. 2d 273 (C.A. 2); *Arrow-Hart & Hegeman Elec. Co.* v. *F.T.C.*, 291 U.S. 587.

> continued ownership could be effectively prevented only by requiring the owner wholly to divest itself of the stock and thus render possible once more free play of the competition which had been wrongfully suppressed. * * *

In *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U.S. 587, the Court held that Section 11 specifies stock divestiture as the sole means by which the Trade Commission may enforce Section 7.

It is only reasonable to conclude that Congress contemplated the same type of remedy for the same type of illegal acquisition when the enforcement route followed is a court order pursuant to application by the Attorney General.[3] In a long series of decisions under the Sherman Act, involving stock acquisitions this Court has uniformly approved of divestment as the appropriate remedy. See e.g., *Standard Oil Co.* v. *United States*, 221 U.S. 1, 78–82; *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61, 96–98; *United States* v. *Reading Co.*, 253 U.S. 26, 63–64; *United States* v. *Lehigh Valley R.R. Co.*, 254 U.S. 255, 271; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 188–191; *International Boxing Club* v. *United States*, 358 U.S. 242, 255–259. We suggest that the same remedy is even more clearly required to eliminate violations of Section 7 of the Clayton Act where the gravamen of the offense lies in stock ownership. We are unaware of any reason

[3] On parallel reasoning it can be argued that violations of Section 8, forbidding interlocking directors, are to be remedied in enforcement under Section 15 by the removal of the directors involved, as is specifically provided with respect to cease and desist orders under Section 11, and not by ordering the directors to act impartially in their management activities.

why a proceeding brought by the Federal Trade Commission should result in divestment, whereas an action instituted by the Attorney General should not so result.

2. Even if we are wrong and under appropriate circumstances an illegal acquisition can be remedied by some procedure short of divestment, the plan adopted by the court below is not appropriate in this case since it does not insure against the occurrence of the evils the Act was designed to correct. The stock ownership by du Pont must continue to have its influence in spite of the fact that the voting rights have been removed one step up the line. Du Pont is still left with an investment in General Motors approximating $3,000,000,000, an investment which over the past decade has yielded roughly one-third of du Pont's income.

Exercise of the stockholder's voting franchise is but one of the avenues of influence over management. Investment bankers and large creditors have long been known to possess extensive power over corporate management without the right to vote a single share of stock. In fact, any conscientious management must, in handling other people's money, take into consideration the interests of those investors, as trustees do, even if formal power to direct them or fire them, is absent. But such direct power is not even absent under the plan adopted by the court below. The stockholders of du Pont will for the indefinite future continue to vote about 17% of the stock of General Motors. General Motors' management cannot help but know that this large segment of its electorate will benefit from action favorable

to du Pont. This must result in decisions favoring du Pont.

In a comparable situation, this Court held that a judgment fell short of the effective relief that was required. In *Continental Insurance Co.* v. *United States*, 259 U.S. 156, the Court held that, because mutuality of interest in the financial success of two corporations, notwithstanding elimination of all direct or indirect stock control of one by the other, was likely to lead to their favoring each other in their trade relationships, the mutuality of interest should be eliminated. The case came before the Court on appeal from the judgment entered on the remand from this Court following its decision in *United States* v. *Reading Co.*, 253 U.S. 26, that a holding company's acquisition of all the stock of a railroad and a coal company violated the Sherman Act, and that the judgment should provide for complete independence of the two operating companies. The judgment entered on remand required disposition of the Coal Company's stock to persons not stockholders of the Railroad.[4] As to a non-redeemable $93,000,000 bond issue secured by a mortgage on the property of both the Railroad and the Coal Company, the judgment below required the Railroad to assume liability for the entire issue, and required the Coal Company, in exchange, to pay $10,000,000 and to deliver $25,000,000 of its bonds secured by a mortgage on its property. Under these judgment provisions, each company would be injured if the other defaulted

[4] The required complete separation of stock ownership stands in contrast with the judgment in the instant case.

in its mortgage obligations, and each therefore had an interest in preserving the other's solvency. In an opinion by Chief Justice Taft, this Court unanimously held that these circumstances provided "constant motive" for inter-company favoritism and "community of operation," inconsistent with effective relief. 259 U.S. at 167–168, 171, 173. Accordingly, the Court directed that the judgment be modified so as to provide that the Railroad and Coal Company should each be liable for only a specified portion of the outstanding bond issue. *Id.* at 173.[8]

3. The district court found that divestment of the General Motors stock would injure innocent stockholders because of the impact of federal income taxes and of the market disorders which the court found would follow large forced sales of the stock. In the first place, we question whether the impact of federal taxes is an appropriate factor for consideration. If it is the national policy to impose taxes on certain transactions, it is not the function of the courts to devise plans to avoid such taxation. To be sure, a plan should not be selected for the purpose of increasing the federal revenue; but neither should an antitrust court prefer an ineffective decree to an effective one because the former would decrease tax payments. As for the anticipated disruption of the market which the court found would result from a forced distribution, we agree that the companies involved should be permitted to devise plans which will minimize such ad-

[8] The liability of each was to be the ratio of the value of its property pledged under the mortgage to the value of all property pledged thereunder.

verse effects, provided that there is no impairment of the primary public interest in a speedy termination of the relationship.* If the inevitable result of divestment is a reduction in the market value of the stockholders' interest, then the stockholders must accept that result as the price they must pay for the illegal relationship and its benefits. There is no difficulty with recognizing the equity of this result as far as du Pont stockholders are concerned, since it was their corporation which made the illegal acquisition and since they have profited through the years to the extent of over $100,000,000 a year in dividends and some $2,750,000,000 in capital appreciation. The effect on General Motors stockholders would be the sec-

*The government suggested to the court that disposition could be made through periodic distribution of the General Motors stock in the form of dividends. The court below found that this would result in the imposition of large taxes on the stockholders and in a large volume of forced sales which would disrupt the market. Although the Government introduced much evidence to the contrary, there is nothing in such a method of distribution which is basic to the Government's position. There are other devices for distribution which could be used instead of, or in combination with, a distribution through dividends. Du Pont could offer General Motors stock in exchange for its outstanding preferred stock, or offer its stockholders appropriate packages of General Motors stock in exchange for their du Pont holdings, or it could sell stock to General Motors to meet its considerable requirements for its Bonus Plan, or negotiate sales to pension funds or insurance companies, or sell on the Exchange or through a public offering. Perhaps the final order could fix a stated number of shares a year which must be disposed of, leaving to the management the choice as to what combination of these or other methods should be used in effecting such disposition. The Government believes that the finding of the court below that distribution cannot be made without disastrous results is not supported by the record.

ondary result of temporary disruptions in the market insofar as the plan of distribution finally adopted results in more stock reaching the market than it can readily absorb. The underlying value of their investment will not be harmed; indeed in the long run it may be improved. It will be desirable to avoid even such temporary market disruptions, but if that cannot be, as the court below believed, then the private interests of these investors cannot be permitted to stand in the way of the public welfare as determined by Congress.

This Court has had occasion before to consider a plea that remedies against antitrust violations would be harmful to innocent investors. In *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189, the defendants urged before this Court that the stock divestiture provisions of the district court's judgment were "inequitable and harsh income tax wise", exceeded "any reasonable requirement for the prevention of future violations", and were "punitive." This Court's reply was that antitrust violators may not avoid an undoing of their unlawful conduct "on the plea of hardship or inconvenience" (*ibid.*). It also held that the fact that the divestiture requirements covered minority stock holdings of persons not parties to the suit "is no legal barrier to a separation of the companies." *Id.* at 190.

Recently in *International Boxing Club* v. *United States*, 358 U.S. 242, this Court upheld a judgment requiring two individual defendants to divest themselves of their Madison Square Garden stock in the face of the contention (Appellants' Br. 31–32) that the forced sale of this stock could depress the value of not only

the stock owned by these defendants but also of the stock of other stockholders not charged with an illegal conduct. Moreover, the 219,000 shares ordered to be divested were 46% of the 563,500 shares of Madison Square Garden stock then outstanding, and divestiture had to be completed within seven years, whereas here divestiture would involve only 23% of General Motors outstanding stock, and a 10-year period to complete divestiture was suggested by the Government.

The decisions of this Court dealing with questions of relief in antitrust cases have established fundamental principles which are controlling here. Where violations of law have been found, the paramount interest to be considered in formulating a decree is the interest of the public that the illegality be effectively removed. To that interest, all other interests must be subordinate. A decree in a civil antitrust proceeding is remedial, not punitive. Accordingly, where a court has a choice of alternative forms of relief which are equally effective in dissipating the illegal conditions found, it may properly take into account the avoidance of hardship upon the parties or third persons. However, a court may not reject an effective decree and promulgate an ineffective one, on the ground that the latter would impose less hardship on private interests affected. We repeat that the basic question must be: Will the proposed decree be effective in the public interest? If the answer is no, the decree cannot be justified on the ground that it imposes less hardship than would an effective decree. In perhaps every antitrust case where violation of the law has been found, correction of the illegality—even if it takes the form of a mere restoration of the status

quo ante—inevitably creates hardships in some degree on some persons just as the illegal action has often caused injury to others along with the gains to those participating. These burdens should, of course, be minimized to the extent consistent with attaining the objective of effective relief, but they cannot serve as an excuse or justification for a failure to enter the kind of decree which the facts and law require.

CONCLUSION

The Government believes that despite assertions to the contrary the court below subordinated the interests of the public as a whole in the enforcement of the Clayton Act to the specific interests of the stockholders of General Motors and du Pont. This is the error we would have this Court correct.

Respectfully submitted,

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